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6 UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
8 OAKLAND DIVISION  
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10 CARL ALEXANDER WESCOTT,

11 Plaintiff,

12 vs.

13 ERIC REISNER,

14 Defendant.

Case No: C 17-06271 SBA

**ORDER TO SHOW CAUSE WHY  
ACTION SHOULD NOT BE  
DISMISSED PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 41(B)**

15 Plaintiff Carl Wescott (“Plaintiff”), proceeding pro se, filed a Complaint for breach  
16 of contract and other related causes of action against Defendant Eric Reisner (“Defendant”)  
17 on October 30, 2017. Dkt. 1.<sup>1</sup> Defendant, also proceeding pro se, filed an Answer on  
18 January 29, 2018. Dkt. 13.

19 On or about August 16, 2018, Judge Edward M. Chen—to whom the action was  
20 then assigned—ordered the parties to exchange initial disclosures pursuant to Federal Rule  
21 of Civil Procedure 26 within 30 days and to participate in a settlement conference within 90  
22 days. Dkt. 50. The action was referred to Magistrate Judge Kandis A. Westmore for  
23 settlement, and a settlement conference was scheduled for November 16, 2018, at 11:00  
24 a.m. Dkt. 55. Magistrate Judge Westmore’s settlement conference order required, among  
25 other things, that each party prepare and submit a settlement conference statement at least  
26 10 calendar days prior to the conference (i.e., no later than November 6, 2018). *Id.* at 3.

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28 <sup>1</sup> The Complaint also named Kerry Condon as a defendant; however, she was  
dismissed from the action on June 1, 2018. *See* Dkt. 44.

1 On November 15, 2018, Magistrate Judge Westmore issued an order terminating the  
2 settlement conference. Dkt. 59. Magistrate Judge Westmore stated that Plaintiff had failed  
3 to submit a settlement conference statement. Id. at 1. Additionally, when the Court  
4 attempted to contact Plaintiff by telephone, which it did at least ten times, the Court was  
5 directed to a message indicating that the user’s mailbox was full. Id. Because Plaintiff had  
6 not submitted a settlement conference statement as ordered, and because he had provided a  
7 telephone number that “effectively render[ed] him unreachable,” Magistrate Judge  
8 Westmore canceled the settlement conference. Id. at 2. She also ordered Plaintiff to  
9 provide an updated telephone number where he could be reached and to contact the Court  
10 to reschedule the settlement conference. Id. It appears Plaintiff made no subsequent  
11 attempt to schedule another conference.

12 On November 27, 2018, Magistrate Judge Elizabeth D. Laporte—to whom the  
13 action had been reassigned—issued a Case Management and Pretrial Order pursuant to  
14 Federal Rule of Civil Procedure 16, setting a pretrial schedule. Dkt. 62. Among other  
15 things, the Order provides a fact discovery cutoff of May 14, 2019, and specifically  
16 instructs the parties to supplement and/or correct their Rule 26 disclosures on an ongoing  
17 basis and at least 28 days before the fact discovery cutoff date. Id. ¶¶ 2.a. & d. The Order  
18 also sets a deadline to file dispositive motions by July 2, 2019, with a pretrial conference on  
19 September 24, 2019, and trial set to begin on October 15, 2019. Id. ¶¶ 1.a., 3 & 5.a.

20 On December 6, 2018, Plaintiff filed his first motion for default judgment. Dkt. 64.  
21 Magistrate Judge Laporte denied the motion on January 23, 2019. Dkt. 69. Shortly  
22 thereafter, on February 26, 2019, Magistrate Judge Laporte held a further case management  
23 conference. Dkt. 76. At that time, Defendant stated that he had yet to receive from  
24 Plaintiff a copy of the final, signed contract underlying the dispute. Id. Magistrate Judge  
25 Laporte ordered Plaintiff to provide “all documents, especially those related to breach of  
26 contract” to Defendant by March 15, 2019. Id. That deadline was also memorialized in a  
27 written order. Dkt. 77. Magistrate Judge Laporte also re-referred the parties to Magistrate  
28 Judge Westmore to conduct a settlement conference. Dkt. 76.

1 The following day, February 27, 2019, Plaintiff filed his second motion for default  
2 judgment. Dkt. 80. Defendant filed a response to the motion on April 1, 2019. Dkt. 88. In  
3 it, Defendant stated that Plaintiff still had not provided the documents that Magistrate Judge  
4 Laporte ordered him to provide by March 15, 2019. Id.

5 On April 23, 2019, Magistrate Judge Laporte held a hearing on Plaintiff's second  
6 motion for default judgment, which she denied. Dkt. 96.<sup>2</sup> At the hearing, Magistrate Judge  
7 Laporte again ordered the parties to participate in a settlement conference before Magistrate  
8 Judge Westmore. Dkt. 94. Magistrate Judge Laporte also admonished Plaintiff that the  
9 action could be dismissed for failure to prosecute and/or continued noncompliance with the  
10 Court's orders. See Dkt. 96. Thereafter, Magistrate Judge Westmore scheduled a pre-  
11 settlement telephonic conference for June 13, 2019 at 2:15 p.m. Dkt. 97. Defendant  
12 appeared for the telephonic conference; Plaintiff did not. Dkt. 99.

13 A district court may dismiss an action, sua sponte, if the plaintiff fails to prosecute  
14 or to comply with the Federal Rules of Civil Procedure or a court order. Fed. R. Civ. P.  
15 41(b); see also Hells Canyon Pres. Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir.  
16 2005); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). In determining whether to  
17 dismiss an action under Rule 41(b), the Court must weigh: (1) the public's interest in  
18 expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk  
19 of prejudice to the defendants; (4) the public policy favoring disposition of cases on their  
20 merits; and (5) the availability of less drastic alternatives. Ferdik, 963 F.2d at 1260-61.

21 As set forth above, Plaintiff has violated (and continues to violate) Judge Chen's  
22 order requiring the parties to participate in a settlement conference within 90 days of  
23 August 16, 2018. He has also failed on two occasions to comply with Magistrate Judge  
24 Westmore's specific settlement conference orders. A settlement conference was initially  
25 scheduled for November 16, 2018. Plaintiff violated Magistrate Judge Westmore's  
26 settlement conference order by not filing a timely settlement conference statement,

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28 <sup>2</sup> In denying the motion, Magistrate Judge Laporte noted that Defendant has "fully  
participated" in the case since the denial of the first motion for default judgment. Dkt. 95.

1 resulting in the termination of the scheduled conference. Plaintiff also failed to comply  
2 with Magistrate Judge Westmore’s subsequent order directing him to contact her chambers  
3 to reschedule the conference. More recently, in April 2019, Magistrate Judge Laporte again  
4 ordered the parties to participate in a settlement conference. Plaintiff violated that order, as  
5 well as Magistrate Judge Westmore’s subsequent scheduling order, when he failed to  
6 appear for the pre-settlement telephone conference on June 13, 2019. As a result of  
7 Plaintiff’s conduct, the parties have yet to complete their selected ADR process, despite the  
8 fact that Judge Chen first directed them to do so nearly *two years ago*. In doing so, Plaintiff  
9 has also wasted Magistrate Judge Westmore’s time and resources.

10 The Court also observes that Plaintiff has done little to advance this action toward  
11 trial or some other final resolution. See Fidelity Philadelphia Trust Co. v. Pioche Mines  
12 Consol., Inc., 587 F.2d 27, 29 (9th Cir. 1978) (“It is a well established rule that the duty to  
13 move a case is on the plaintiff and not on the defendant or the court.”). Although Plaintiff  
14 provided some initial disclosures, he had not, as of April 1, 2019 (and possibly to the  
15 present day), provided Defendant with a copy of the contract upon which the action is  
16 based. This is despite: (1) Judge Chen’s order in August 2018 requiring the parties to  
17 exchange their Rule 26 disclosures within 30 days; (2) the Case Management and Pretrial  
18 Order requiring the parties to supplement and/or correct their disclosures on an ongoing  
19 basis and at least 28 days before the fact discovery cutoff; and (3) Magistrate Judge  
20 Laporte’s order in February 2019 requiring Plaintiff to provide a copy of the contract and  
21 all other documents related to the breach of contract claim by March 15, 2019.  
22 Furthermore, although the fact discovery cutoff passed on May 14, 2019, it appears that no  
23 meaningful discovery has been completed. Nor was a dispositive motion (e.g., a motion for  
24 summary judgment) filed prior to the motion cutoff on July 2, 2019.

25 The only action Plaintiff has taken in this case is the filing of two *unsuccessful*  
26 motions for default judgment. The Court notes that the second of those motions was filed  
27 directly on the heels of the denial of the first motion, even though Defendant has “fully  
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1 participated” in the action following the first motion. Dkt. 95.<sup>3</sup> In view of the forgoing, the  
2 Court is left with the impression that Plaintiff seeks to avoid a settlement conference or any  
3 other test of the merits of his action.

4 IT IS HEREBY ORDERED THAT Plaintiff shall show cause why the action should  
5 not be dismissed under Rule 41(b) for failure to comply with the Court’s orders requiring  
6 him to (1) participate in a settlement conference and (2) supplement his initial disclosures  
7 to provide Defendant with documents related to his breach of contract claim, including a  
8 copy of the contract. Within **ten days** of the date this Order is filed, Plaintiff shall file a  
9 written response (supported by a declaration, if appropriate) explaining why the action  
10 should or should not be dismissed. In addition, Plaintiff’s written response shall set forth  
11 the nature of the case, its present status (including the status of discovery), and the reasons  
12 that additional action has not been taken to bring the case to a final resolution (including  
13 why no dispositive motion was filed and whether Plaintiff anticipates filing a motion to  
14 modify the pretrial schedule if the case is not dismissed).<sup>4</sup> **FAILURE TO FULLY**  
15 **COMPLY WITH THIS ORDER WILL BE DEEMED SUFFICIENT GROUNDS TO**  
16 **DISMISS THE ACTION, WITHOUT FURTHER NOTICE.**

17 IT IS SO ORDERED.

18 Dated: August 5, 2019

  
SAUNDRA BROWN ARMSTRONG  
Senior United States District Judge

24 <sup>3</sup> The Court acknowledges that Defendant has not always complied with court orders  
25 and deadlines. As stated above, however, Plaintiff bears the burden of advancing his case  
26 to a final determination. If a defendant fails to provide disclosures or respond to discovery  
requests, it is incumbent upon the plaintiff to file the necessary motions to compel such  
action. The Court cannot adjudicate matters not placed before it by the parties.

27 <sup>4</sup> The parties are advised that the Court is not inclined to retroactively extend  
28 deadlines that have already passed, absent both exigent and unforeseen circumstances and a  
reasonable explanation as to why an extension was not sought sooner.